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No. (1)

Supreme Court, U.S.
FILED
07-282 AUG 28 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

MONICA J. SADLER,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the state court's refusal to consider the Petitioner's constitutional due process and impairment of contracts challenges to the rate-increase proceeding before the Illinois Commerce Commission, allegedly for failure to preserve the constitutional claims at the administrative level, a violation of the Supremacy and/or Due Process Clauses of the United States Constitution, as an untenable nonfederal ground that blocked consideration of the federal claims without any fair or substantial support in state law?

PARTIES TO THE PROCEEDING BELOW

The Woodhaven Association—Appellant

Monica J. Sadler—Appellant

Illinois Commerce Commission—Respondent

Aqua Illinois, Inc.—Respondent

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS IN CASE

Rule 23 Order of Third District Appellate Court in *Sadler v. ICC*, dated March 2, 2007 (unreported)

Judgment entered by Illinois Supreme Court, dated May 31, 2007 (unreported)

Order entered by Illinois Commerce Commission, dated November 8, 2005

STATEMENT OF JURISDICTION

The date of the judgment of the Illinois Supreme Court denying discretionary leave to appeal the Appellate Court's Order is May 31, 2007, and the date of order of the Appellate Court of Illinois, Second District, which is, therefore, the highest court of Illinois in which a decision could be had and which is the order sought to be reviewed by this Court, is March 2, 2007.

The statutory provision conferring jurisdiction upon this Court is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. art. I, § 10, cl. 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Material Facts

In December 2004, Aqua Illinois filed revised tariff sheets with the Illinois Commerce Commission (the "Commission"), seeking general increases in water and sewer rates for its Woodhaven Division and general increases in its water rates for its Oak Run Division, which supplies water service to the Oak Run development in Knox County, Illinois. (Rule 23 Order at 2.)

The Oak Run development consists of 2,600 single-family residential lots in 8 subdivisions, each with its own name and its own separate Declaration of Restrictive Covenants. There is no Declaration of Restrictive Covenants that applies to the entire Oak Run development. The Oak Run Property Owners' Association ("ORPOA") administers the eight separate Declarations, with each Declaration being enforceable only in the applicable subdivision. (Rule 23 Order at 3.)

ORPOA petitioned to intervene in this action on April 8, 2005, and that petition was granted. ORPOA contested the

proposed rate increase on various grounds. Petitioner Monica J. Sadler is an owner of multiple lots in the Oak Run Division and an "availability" customer, as described below. (R. C-6166 through C-06175.)[1] Sadler filed her Petition to Intervene on September 23, 2005, after learning that the ORPOA was not pursuing the issues she wished to see addressed (R. C-06166 through C-06167), and after being advised by an ICC employee to intervene in the proceeding. (R. C-06163 through C-06164.) Sadler's Petition raised a different set of issues than ORPOA and asserted that her interests were not represented by ORPOA, and was granted on the basis of such interest. (R. C-6166 through C-06175.)

Approximately 80% of the lots in Oak Run (over 2,000) are undeveloped and are not connected to Aqua Illinois' water system. Aqua Illinois charges these owners an "availability charge" on the theory that water service would be available to these owners should they develop their lots and pay additional charges to have their lots connected to the main water supply.

Sadler's position was that the permissible water charges for the Oak Run Division are established by contracts between the affected property owners and the utility, which are contained within the Declarations of Restrictive Covenants between the property owners and Aqua Illinois' predecessor in interest, and within Amendments to certain of those Declarations. These Declarations and Amendments would, therefore, be determinative of Aqua Illinois' request to impose and/or raise the "availability charges" at Oak Run. Sadler sought to show that the availability charges were entirely precluded by the express terms of these contracts, and that,

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[1]All Record references are to the Record from the Illinois Commerce Commission, which was the Record before the Illinois Appellate Court.

therefore, no increase in those charges could be granted without further contravening the terms of the contracts.

The ALJ had reopened the record on September 15, 2005, at Aqua Illinois' request, to permit them to show compliance with the publication requirement. Aqua Illinois was given a deadline of September 23, 2005, to supply that evidence. (Index at 10.) Sadler's Petition to Intervene was filed on September 23, 2005. Aqua Illinois' evidence was not submitted until September 26, 2005. (R. C-06425.) On October 4, 2005, the ALJ marked the record "heard and taken" as of October 3, 2005, and granted Sadler's Petition to Intervene as of October 4, 2005. (R. C-06207.) Sadler sought to introduce the Declarations and Amendments into the record of the Commission proceeding and contended that Aqua Illinois was required by statute to file the relevant contracts with the Commission and that the ALJ was required by statute to compel their production. However, Sadler was not allowed to submit evidence into the record on the grounds that to do so would unduly delay the proceeding and none of the Declarations or Amendments were ever placed in evidence. (Rule 23 Order at 3.)

On October 5, 2005, one day after granting Sadler's Petition to Intervene, the ALJ issued the Proposed Order recommending granting the increase. (R. C-06425, C-06533.) Sadler filed a Brief on Exceptions on October 13, 2005 (R. C-06425 through C-06435) in which she claimed that the proposed increases violated Article I, § 10, Clause 1 of the United States Constitution, known as the Contracts Clause. She quoted the text of the constitutional provision verbatim. (R. C-06427 through C-06428.) The Final Order was entered on November 8, 2005. (R. C-06624 through C-06687.) Following the recommendation of the ALJ, the Commission granted an increase in the Oak Run water division to produce annual base rate revenues of about $489,000, an increase of about 50% over the previous rate. (Rule 23 Order at 5.)

Sadler filed a Motion to Hold Oral Argument, Motion for Additional Hearing, and Motion to Admit Post-Record Data on November 10, 2005. (R. C-06710 through C-06723.) She called for "the Illinois Commerce Commission not to further interfere with the private contracts of each Oak Run availability customer." (R. C-06720.) She objected to "unlawful approval of increases in water availability fees, by the Illinois Commerce Commission, which had no basis in law, or in fact, and appear to violate the Constitutional Rights of an entire class of Oak Run Property Owners." (R. C-06721.)

Sadler filed an Application for Rehearing on December 8, 2005. (R. C-06825 through C-06839.) The ALJ recommended that the Commission deny this application. In so doing, he said, "Ms. Sadler's underlying argument is that the covenants applicable to Aqua's customers in the Oak Run Water Division limit what they can be charged for water service. For a better understanding of Ms. Sadler's arguments, I encourage the Commission to review the November 10 filing." (R. C-06858.) These motions and petition were denied by the Commission. (R. C-06860.)

On appeal, Sadler argued to the Illinois Appellate Court that the rate increases were not supported by substantial evidence because the contracts were not allowed in evidence; that the ALJ abused his discretion by disallowing Sadler's proffered evidence and marking the record "heard and taken" one day before allowing her to intervene; and that the ICC's decision to grant the rate increase violates the United States and Illinois prohibitions against impairment of contracts. (Brief of Intervenor-Appellant Monica J. Sadler; Reply Brief of Monica J. Sadler; Petition for Rehearing [of Monica J. Sadler].) After an adverse decision by the Appellate Court, Sadler petitioned for leave to appeal to the Illinois Supreme Court, and her petition was denied. (Rule 23 Order; Illinois Supreme Court Judgment, dated May 31, 2007.)

B. When And How The Federal Questions Were Raised

Sadler raised her federal constitutional questions both before the Illinois Appellate Court and earlier to the Illinois Commerce Commission. Sadler specifically argued to the Illinois Appellate Court that the decision not to allow her to present any evidence in support of her claims deprived her of her fundamental, constitutional due process right to a fair hearing and of the opportunity to have her federal claim under the Contracts Clause of the United States Constitution considered. (Brief of Intervenor-Appellant Monica J. Sadler at 15, 24-27.)

As Sadler explained to the Illinois Appellate Court, she had earlier raised these federal constitutional issues before the Illinois Commerce Commission. She pointed out to the court her repeated references to the contracts evidence issue, as well as to the impairment of contracts issue, before the Commission. (Brief of Intervenor-Appellant Monica J. Sadler at 14, 18-19, 20, 22-23, 24-27; Reply Brief of Monica J. Sadler at 12, 15, 19-20; Petition for Rehearing [of Monica J. Sadler] at 7-8.)

Before the Commission, immediately following the ALJ's Proposed Order recommending that the Commission grant the rate increase, Sadler had filed a Brief on Exceptions (R. C-06425 through C-06435) in which she expressly argued that the proposed rate increases violated the Contracts Clause of the United States Constitution. She quoted the text of the constitutional provision verbatim. (R. C-06427 through C-06428.) Shortly thereafter, Sadler had filed a Motion to Hold Oral Argument, Motion for Additional Hearing, and Motion to Admit Post-Record Data (R. C-06710 through C-06723) in which she called for "the Illinois Commerce Commission not to further interfere with the private contracts of each Oak Run availability customer" (R. C-06720) and objected to the "unlawful approval of increases in water availability fees, by

the Illinois Commerce Commission, which had no basis in law, or in fact, and appear[ed] to violate the Constitutional Rights of an entire class of Oak Run Property Owners." (R. C-06721.) Finally, Sadler had filed an Application for Rehearing (R. C-06825 through C-06839), in which she, again, referenced the governing contractual provisions, the Commission's "interference with enforcement of the provisions of [the] governing documents," the evidentiary deficiencies in the record, and the interference with private contracts (R. C-06827, C-06828, C-06829, C-06830, C-06832, C-06834, C-06837).

C. Court's Treatment Of The Federal Questions

The Illinois Appellate Court concluded that Sadler's evidence came within an exception to the due process-based rule that a party may present evidence in support of its position because "she attempted to intervene after the evidence had been closed. (Rule 23 Order at 19.) The court further found "nothing in the record or her arguments that suggest why she could not have made her concerns known to ORPOA, the body charged with representing the interests of the Oak Run property owners." (Rule 23 Order at 20.) Finally, it found that Sadler had forfeited consideration by the court of the Contracts Clause issue by not "adequately" raising it before the Commission. (Rule 23 Order at 21.) The Illinois Supreme Court simply avoided these issues by denying leave to appeal. (Illinois Supreme Court Judgment, dated May 31, 2007.)

REASONS FOR GRANTING THE PETITION

The Illinois Appellate Court decided this case in disregard of principles established by this Court for the consideration of federal constitutional claims, and in effect disregarded the federal constitutional claims that Sadler had raised before the Illinois Commerce Commission by relying on untenable state procedural grounds to dispose of the case.

The court declined to determine Sadler's federal constitutional claim based on impairment of contracts by concluding, based on an inappropriately stringent construction standard, that she had not properly raised the issue in her Petition for Rehearing. The court also avoided her federal constitutional claim based on violation of due process by concluding that the Commission had acted consistent with state law. (Rule 23 Order at 15-21.)

These conclusions are contrary to both the law and the facts and depart from this Court's precedents. First, Sadler's submissions should have been liberally construed since she was proceeding pro se. Second, Sadler did adequately raise her constitutional impairment of contracts issue before the Commission, but even if she had not, the court was obligated to consider it. Finally, the Commission did not act consistent with state law, but even if it had, the court should have determined Sadler's due process challenge based on the constitutional requirements imposed, not on the basis of state law.

This Court, in recognizing that it has jurisdiction to review state decisions that foreclose federal claims on inadequate state procedural grounds and rejecting the argument that the asserted state grounds were adequate, has explained:

> "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that question, this court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court." *First*

> *National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 346, 46 S.Ct. 135, 137, 70 L.Ed. 295, and cases cited. . . . Whether the constitutional rights asserted by the appellant were "* * * given due recognition, by the (court of appeals) is a question as to which the (appellant is) entitled to invoke our judgment, and this (she has) done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support * * * (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Ward v. Board of Com'rs of Love County*, 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751, and cases cited.

Staub v. City of Baxley, 355 U.S. 313, 318-19 (1958) (lack of standing for failure to seek permit under ordinance being challenged on constitutional grounds was not an adequate nonfederal ground).

In an early case, in making it clear that while state courts may deal with local matters as they think proper they cannot defeat the assertion of federal rights through state procedural rules, this Court explained:

> Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . If the Constitution and laws of the United States are to be enforced, this Court

> cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); *see also Davis v. Corona Coal Co.*, 265 U.S. 219, 222-23 (1924) (power of state over its own courts cannot be used to defeat a federal constitutional right).

In more recent cases, this Court, citing numerous previous decisions, has noted that the adequacy of state-law grounds to preclude litigation of federal claims is itself a federal question and that grounds that are inconsistent with or violate federal law, or have not been strictly or regularly followed, are not valid ones, given the Supremacy Clause in the federal Constitution. *E.g.*, *Howlett v. Rose*, 496 U.S. 356, 366, 371 (1990); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63, *reh'g denied*, 458 U.S. 1131 (1982).

This court went on to explain that the fact that a given state rule is denominated as jurisdictional does not provide state courts with a valid excuse to avoid their obligation to enforce federal law if the rule does not reflect the concerns that jurisdictional rules are designed to protect—that is, power over the person and the subject matter. *Howlett*, 496 U.S. at 381-83 (state sovereign immunity rules not a proper ground for refusing to hear § 1983 claims against local governmental entities).

The state rules upon which the Illinois Appellate Court relied in this case did not provide a valid excuse for avoiding enforcement of the federal Constitution. This case, therefore, presents a powerful justification for review of the state court decision by this Court on the basis that the state court blocked consideration of important federal constitutional questions by

means of the misapplication of state procedural rules and in departure from this Court's precedents on the federal law.

I. THE ILLINOIS COURTS DEPARTED FROM THIS COURT'S PRECEDENTS CONCERNING PRO SE PARTIES.

Sadler was proceeding before the Illinois Commerce Commission pro se. The Illinois Appellate Court, however, applied an extremely stringent standard to the grounds for her appeal, finding that she had not adequately raised the impairment-of-contracts issue to the Commission in her Petition for Rehearing. (Rule 23 Order at 21.) As should be clear from the references, *supra*, on how and when her issues were raised, she did, in fact, adequately raise the issue before the Commission. As this Court has repeatedly stated, moreover, documents from parties proceeding pro se are to be liberally construed and must be held to less stringent standards. *See, e.g.*, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). This principle should, if anything, apply with even greater force in administrative hearings, which are supposed to be more informal to begin with—precisely because the parties often are not represented by lawyers.

Accordingly, even if Sadler's Petition for Rehearing was technically inadequate, the court should not have refused to consider the issue when the purpose of the technical requirements under state law had been fully satisfied. By applying a stringent standard, and even then applying it incorrectly, as outlined *infra*, the Illinois Appellate Court evaded consideration of Sadler's federal constitutional claim for impairment of contracts.

II. THE ILLINOIS COURTS DEPARTED FROM THIS COURT'S PRECEDENTS, AS WELL AS THOSE OF ILLINOIS, CONCERNING WAIVER OF CONSTITUTIONAL CLAIMS.

The Illinois Appellate Court concluded that Sadler failed to properly raise her impairment-of-contracts claim before the Commission, relying on the provision under 220 Ill. Comp. Stat. 5/10-113 that limits the scope of appeal to the issues raised in a petition for rehearing. (Rule 23 Order at 21.) However, as this Court has clearly stated in another case in which review was sought of an Illinois decision in which the state court, likewise, based its refusal to review a federal constitutional question on a state procedural rule,

> [w]hen federal rights are involved, it is of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them.

Parker v. Illinois, 333 U.S. 571, 574, *reh'g denied*, 334 U.S. 813, *petition denied*, 335 U.S. 856 (1948).

Under Illinois law at the time *Parker* was decided, review of constitutional issues was directly to the state supreme court, and the choice to seek review in the appellate court, instead, constituted an abandonment of the constitutional issues. *See* 333 U.S. at 574-75. Under the currently applicable law, review of Commission decisions is by the Appellate Court, and any review of that court's decision by the state supreme court is entirely discretionary. 220 Ill. Comp. Stat. 5/10-201(a), 5/10-202; Ill. Sup. Ct. R. 315(a) (except as provided under Rule 317, appeals to the Supreme Court from the Appellate Court are within the court's sound judicial discretion), 317 (appeals as of right allowed only where statute has been held invalid or where constitutional

question arose for the first time in and as a result of action of appellate court).

The Illinois Appellate Court concluded that, under state-required procedures, Sadler had not properly preserved her constitutional claims for its review. (Rule 23 Order at 21.) As an initial matter, Sadler *did* raise the impairment of contracts question in her Petition for Rehearing before the Commission, as outlined *supra*. Even if she had not, however, she had repeatedly raised the issue throughout the proceedings, as well as in her other postdecision motions, such that the purpose of the rule—which is to give the Commission the initial opportunity to pass on an issue—was clearly satisfied. *See, e.g., Scherer Freight Lines, Inc. v. Ill. Commerce Comm'n*, 24 Ill. 2d 359, 364, 181 N.E.2d 134, 137-38 (1962) (purpose of rehearing requirement is to give Commission opportunity to correct its alleged errors before resort to courts) (superseded by statute on other grounds); *Chicago Area Recycling Group v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 769, 774, 374 N.E.2d 1008, 1012 (1978) (same).

The Commission was fully aware of Sadler's constitutional challenge, had every opportunity to pass on the issue, and had no reason to think that Sadler had abandoned the issue. It simply evaded the necessity for reaching the constitutional issue raised by Sadler by refusing to allow her to offer any evidence. *See Citizens Utils. Co. of Ill. v. Ill. Commerce Comm'n*, 124 Ill. 2d 195, 206, 529 N.E.2d 510, 515 (1988) (considering plaintiff's claim, despite its failure to articulate it in its application for rehearing, where grounds for Commission's decision were not apparent from its order, since meaningful review would otherwise be thwarted by Commission's failure to express basis for its decision). To foreclose review by the courts based on Sadler's failure to rearticulate the issue in her Petition for Rehearing as precisely as she might have—in effect to find the issue waived—would clearly elevate form over substance. This the more so, given

that, as explained *supra*, Sadler was proceeding *pro se* and her submissions should have been liberally construed.

As this Court has made clear, the principle is well-established that when constitutional questions are in issue, the availability of judicial review is presumed, given that access to the *courts* is essential to the decision of such questions because they are obviously unsuited to resolution in administrative proceedings, the Court will not generally interpret even a federal statutory scheme as taking the "extraordinary" step of foreclosing jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 108-09 (1977). In the context of state law, this Court has stated that

> when the waiver is founded on a failure to comply with the appellate practice of a State the question turns on whether that practice gives litigants "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the state court.

Parker, 333 U.S. at 574-75 (quoting *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194, 195 (1925)). Sadler's claim to this Court is, precisely, that the asserted state practices foreclosed her from any reasonable opportunity to have her claimed contract rights heard and determined, either by the administrative body or by the Illinois courts, and that the foreclosure violates federal due process requirements and/or the Supremacy Clause of the federal Constitution.

Importantly, Illinois courts have consistently held that the waiver rule—that issues and arguments not raised before the administrative body cannot be considered by a reviewing court—is not absolute and is not a limitation on the jurisdiction of a reviewing court, but rather is only an admonition to litigants. *See, e.g., Hunt v. Daley*, 286 Ill. App. 3d 766, 768, 677 N.E.2d 456, 459-60 (1997) (finding that court

hearing administrative appeal was well within the latitude of its discretion to entertain constitutional issue, notwithstanding any waiver contentions); *Freedom Oil Co. v. Ill. Pollution Control Bd.*, 275 Ill. App. 3d 508, 513, 655 N.E.2d 1184, 1188-89 (1995) (issue related to public meetings by telephone conference came within exception to waiver rule because of the likelihood of recurrence); *Miller v. Pollution Control Bd.*, 267 Ill. App. 3d 160, 170, 642 N.E.2d 475, 484 (1994) (court may elect to consider matters not raised in original proceedings where issue of public importance is presented), *appeal denied*, 159 Ill. 2d 570, 647 N.E.2d 1011 (1995). Further, notwithstanding the 220 Ill. Comp. Stat. 5/10-113 limitation, the Illinois provision on review of administrative decisions specifically mandates that the hearing and determination before the court shall extend to "all questions of law and fact presented by the entire record before the court." 735 Ill. Comp. Stat. 5/3-110.

In keeping with 735 Ill. Comp. Stat. 5/3-110, as well as *Califano*, Illinois courts have also consistently held that constitutional issues may be raised for the first time in a complaint for administrative review. *See, e.g., Howard v. Lawton*, 22 Ill. 2d 331, 333-34, 175 N.E.2d 556, 557-58 (1961); *Head-On Collision Line, Inc. v. Kirk*, 36 Ill. App. 3d 263, 268, 343 N.E.2d 534, 538 (1976); *Murray v. Bd. of Review of Peoria County*, 237 Ill. App. 3d 792, 796, 604 N.E.2d 1040, 1043 (1992). In rejecting the argument that constitutional issues cannot be first raised on review, the Illinois Supreme Court acknowledged that

> [t]o hold otherwise would result in piecemeal litigation by first requiring review of an administrative body's decision and then entertaining another action to test constitutionality brought on by such decision.

Howard, 22 Ill. 2d at 333, 175 N.E.2d at 557.

One of the very purposes of administrative review is, after all, to safeguard the constitutional rights of those involved in administrative proceedings. *See Murray*, 237 Ill. App. 3d at 796, 604 N.E.2d at 1043 (finding it entirely proper for plaintiffs to allege violations of their constitutional rights in their complaint for review). In fact, the statute governing review provides that the appellate court

> *shall* reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:
>
> . . . .
>
> C. The rule, regulation, order or decision is in violation of the State or federal constitution or laws; or
>
> D. The proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant.

220 Ill. Comp. Stat. 5/10-201(e)(iv) (emphasis added). Although no new evidence may be introduced in the appellate court, if it appears that the Commission failed to receive evidence properly proffered, the court may remand the case to the Commission with instructions to receive the evidence and to enter a new order based on all the evidence, unless the evidence at issue would not be controlling. 220 Ill. Comp. Stat. 5/10-201(d), (e)(ii); 735 Ill. Comp. Stat. 5/3-111(a)(7), (b) (remand for additional evidence in the interest of justice proper).

In the present case, Sadler clearly informed the Commission of her position that the rates at issue would violate the Contracts Clause of the federal Constitution and that the Commission's refusal to allow her to offer the governing contracts as evidence would violate her basic due process rights to a fair hearing. She also clearly argued both points to the state courts on review. It was error for the court to decline to entertain these questions. *See, e.g., Puffer-Hefty Sch.. Dist. No. 69 v. Du Page Reg'l Bd. of Sch. Trustees of Du Page County*, 339 Ill. App. 3d 194, 199, 789 N.E.2d 800, 806-07 (error for court, which is vested with original jurisdiction over constitutional issues on administrative review, to decline to rule on those issues where given an opportunity to consider them), *appeal denied*, 205 Ill. 2d 644, 803 N.E.2d 500 (2003), *cert. denied*, 540 U.S. 1219 (2004). Certainly, the Appellate Court should have entertained the constitutional issues at least to the extent of determining the due process issue and remanding the case to the Commission with instructions to receive Sadler's evidence and to enter a new order, as appropriate, consistent with the dictates of the Contracts Clause.[2]

The Appellate Court concluded, however, based on state procedural law, that the Commission did not err in

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[2]Setting utility rates is a legislative function, under Illinois law, delegated to the Commerce Commission. *E.g., In re Ill. Bell Switching Station Litig.*, 161 Ill. 2d 233, 247, 641 N.E.2d 440, 447 (1994); *Bus. & Prof'l People for Public Interest v. Ill. Commerce Comm'n*, 146 Ill. 2d 175, 196, 585 N.E.2d 1032, 1039 (1991). Accordingly, the Commission's determination was clearly subject to the Contracts Clause. *See, e.g., Ross v. Oregon*, 227 U.S. 150, 161-63 (1913) (Contracts Clause reaches all legislative action, including a regulation or order of a state instrumentality exercising delegated authority); *New Orleans Waterworks Co. v. La. Sugar-Refining Co.*, 125 U.S. 18, 30-31 (1888) (same).

refusing to reopen the record because Sadler's intervention and attempt to introduce evidence was not timely, given that she became involved in the proceedings "in the final stages, after evidence and arguments had been finalized," because she had failed to show why ORPOA could not have raised her issues for her, and because she attempted to intervene after the evidence had been closed. (Rule 23 Order at 17-19.) The court's conclusions are simply not supportable, given the facts of the case, even under state law, and certainly not under federal law.

As a preliminary matter, the very basis for Sadler's intervention was that she had discovered that ORPOA was not representing her interests, despite her communications with it concerning those interests, because the interests that ORPOA was representing were in conflict with the interests of Sadler and others like her. That the Commission granted Sadler's request to intervene clearly shows that it understood and acknowledged the conflict and entirely undermines the court's contrary conclusion on that matter. (*See* C-06166 through C-01667, C-06207.)

Additionally, the record clearly shows that the evidence had, in fact, been reopened before Sadler intervened, that the Commission sat on her application while the evidence remained open and then allowed her to intervene literally the day before it marked the evidence heard and closed. The Commission then relied on the fact that the evidence was closed to deny her the opportunity to offer the evidence in support of the claims which were the very basis for her intervention. (*See* C-06207.) It is clear that the Commission simply had no intention of being constrained by the facts. More importantly, the reasons put forth by the Commission—not really addressed by the court—for needing to proceed to decision so immediately that it could not consider Sadler's evidence do not hold water under state law.

Under the governing law, once a rate schedule is submitted to the Commission, the rate may be suspended, pending a hearing and decision, for no more than 105 days plus six months, after the time that it would otherwise go into effect—which is 45 days from its filing with the Commission. 220 Ill. Comp. Stat. 5/9-201(b). The Commission argued that it was bound to make its determination within that approximately eleven-month suspension period and, therefore, did not have time to consider Sadler's evidence, and the court characterized the end of the suspension period as the "deadline for the Commission's final decision." (Rule 23 Order at 18.)

As the Illinois Supreme Court explained in directly and emphatically rejecting the very same contention in another case,

> [t]he contention that the Commission must conclude its inquiry into the proposed rate within a ten-month period confuses the power of the Commission to suspend with its power to determine the reasonableness of the rate. The ten-month period applies only to the former. If that period has expired before the Commission has concluded its inquiry, then the utility may begin collecting charges under the new rate, so far as pre-existing contractual obligations permit. The running of the period does not terminate the Commission's inquiry, however, and the new rate remains subject to permanent cancellation by the Commission's final order in the proceedings.

Central Ill. Pub. Serv. Co. v. Ill. Commerce Comm'n, 5 Ill. 2d 195, 206, 125 N.E.2d 269, 274-75 (1955); *see also Antioch Milling Co. v. Pub. Serv. Co. of N. Ill.*, 4 Ill. 2d 200, 204-05, 123 N.E.2d 302, 305 (1954) (Commission has authority to

either suspend new rate or let it go into effect); *City of Edwardsville v. Ill. Bell Tel. Co.*, 310 Ill. 618, 622-23, 142 N.E. 197, 199 (1923) (new rates go into effect on expiration of suspension period, subject to Commission's power to alter or change them as necessary to establish just and reasonable rates); *see also* 220 Ill. Comp. Stat. 5/9-202 (Commission also authorized to enter a temporary order fixing a temporary schedule of rates).

In an Illinois case involving a different administrative body, which had denied a continuance of the proceeding for the purpose of allowing additional evidence, the court, in reversing and remanding for a new hearing, explained:

> We sympathize with the inconvenience caused by the taxpayer's conduct, and with the Department's goal of attempting to achieve a prompt and economical determination on the merits. However, this alone does not justify denial of a continuance under the unique facts presented here. Where an administrative body must choose between justice and speed, it must pick the side of justice.

Six-Brothers King Drive Supermarket, Inc. v. Dep't of Revenue, 192 Ill. App. 3d 976, 984, 549 N.E.2d 586, 591 (1989), *appeal denied*, 132 Ill. 2d 554, 555 N.E.2d 385 (1990). The court in that case did what the court in the present case declined to do, deciding the due process question.

The court's refusal to consider Sadler's constitutional impairment of contracts claim on a basis that does not even conform to Illinois law is certainly an untenable basis under this Court's holdings.

III. THE ILLINOIS APPELLATE COURT DEPARTED FROM THIS COURT'S PRECEDENTS CONCERNING THE REQUIREMENTS OF DUE PROCESS.

It is well established by this Court's decisions that due process requires an opportunity to be heard at a reasonable time and in a reasonable manner, which includes the right to present evidence, and a *pro forma* opportunity will not do. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 182, *reh'g denied*, 518 U.S. 1047 (1996); *see also Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 1722 (2006). It has also long been established that due process requirements extend to administrative, as well as judicial proceedings. *See, e.g., Spencer v. Merchant*, 125 U.S. 345, 358-61 (1888); *see also Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976) (whether administrative procedures are constitutionally sufficient requires analysis of private interest affected, risk of erroneous deprivation under procedures, probable value of other procedures, and government's interest). In *Spencer*, the Court explained that the state

> can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded upon the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty, or property, without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law" has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitutions. It is a limitation upon an arbitrary power, and is a guaranty against arbitrary legislation.

125 U.S. at 358-59 (quoting *Stuart v. Palmer*, 74 N.Y. (29 Sickels) 183, 190, 1878 WL 12642 (1878) (where owners of land were deprived of opportunity to be heard on issue whether assessment was equitable and fair, their due process rights were violated)).

Setting utility rates, like the provision challenged in *Spencer*, is an act by the state which is subject to the requirements of due process. As this Court has pointed out, it has been clear from more than a century that due process requires that parties whose rights are to be affected are entitled to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80, *reh'g denied*, 409 U.S. 902 (1972). At a minimum, due process requires that those who are entitled to be heard be given a meaningful opportunity to present their case. *Mathews*, 424 U.S. at 349.

The Illinois Administrative Procedure Act, which is specifically made applicable to Commission ratemaking proceedings by 220 Ill. Comp. Stat. 5/10-101, codifies the federal Due Process Clause requirement that all parties before the Commission have an opportunity to present evidence and argument. 5 Ill. Comp. Stat. 100/10-25(b). In *Six-Brothers King Drive Supermarket*, the court explained:

> Illinois courts have a duty to ensure that due process and impartial hearings were afforded in administrative hearings. . . . Under the Fourteenth Amendment, the opportunity to be heard should not be arbitrarily limited and fair consideration of an individual's objections should be included. *Mahonie v. Edgar* (1985), 131 Ill.App.3d 175, 87 Ill.Dec. 13, 476 N.E.2d 474.
>
> . . . .

. . . [T]he refusal to continue the hearing meant that the Department could not review the books and records which were now available. Hearings before an administrative agency should be investigatory proceedings instituted for the purpose of ascertaining and making findings of facts. (*Lavin v. Civil Service Com.* (1974), 18 Ill.App.3d 982, 310 N.E.2d 858.) Hearings are not meant to be partisan, with the agency pitted against the individual. (*Goranson v. Dept. of Registration & Education* (1980), 92 Ill.App.3d 496, 47 Ill.Dec. 936, 415 N.E.2d 1249.) In effect, the taxpayer handed the Department the documents which would best serve the Department's function of ascertaining the truth, and the Department refused to look at the documents. . . .

. . . The Administrative Review Act provides that a party has the right to be represented by counsel and the right to respond to and present evidence and argument. (Ill.Rev.Stat.1987, ch. 127, par. 1010(b).) Due process of law presupposes a fair and impartial hearing. (*Brown v. Air Pollution Control Board.*) Procedural due process requires that every person be given the opportunity to be heard before being deprived of his property. (*George J. Priester Aviation Service, Inc. v. American School of Aviation, Inc.* (1981), 95 Ill.App.3d 703, 51 Ill.Dec. 201, 420 N.E.2d 615.) Here, the Department denied the taxpayer the opportunity . . . to offer any witnesses or documentary evidence . . . .

> Thus, the . . . hearing became an *ex parte* proceeding, with Sweilem required to sit mute and watch.

192 Ill. App. 3d at 982, 549 N.E.2d at 589-90.

As this Court explained in an analogous case to the present one, in which judgment was entered against a party the moment he was added,

> Procedure of this style has been questioned even in systems, real and imaginary, less concerned than ours with the right to due process.[2]

---

[2]A well-known work offers this example:

> "'Herald, read the accusation!' said the King. On this the White Rabbit blew three blasts on the trumpet, and then unrolled the parchment scroll, and read as follows:
>
> > *'The Queen of Hearts, she made some tarts,*
> > *All on a summer day:*
> > *The Knave of Hearts, he stole those tarts,*
> > *And took them quite away!'*
>
> 'Consider your verdict,' the King said to the jury.
>
> 'Not yet, not yet!' the Rabbit interrupted. 'There's a great deal to come before that!'" L. Carroll, Alice in Wonderland and Through the Looking Glass 108 (Messner 1982) (emphasis in original).

Nelson v. Adams USA, Inc., 529 U.S. 460, 468 & n.2 (2000).

In the present case, similarly, the decision was rendered when there was still a great deal to come—in this case, the evidence and argument on an important federal impairment of contracts claim that affects thousands of property owners. The Commission placed the alleged need to render an immediate decision above the state legislature's mandate that rates be reasonable and just. Moreover, this Court has required a reliable determination on the merits, however long it takes, for a hearing on revision of rates that requires time beyond the rate suspension period. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979) (no state interest in delaying full hearing).

Finally, although the court also relied on the availability of formal complaint procedures (*see* Rule 23 Order at 18), those procedures are clearly aimed at violations by others than the Commission, *see* 220 Ill. Comp. Stat. 5/10-108 (on filing of complaint, Commission to have copy served on person or corporation complained about with notice of requirement that complaint be answered), and would certainly not provide due process, in any case. As this Court has made clear, except in extraordinary situations where the government's interest justifies postponing the hearing, due process requires that the opportunity to be heard be given *before* a person is deprived of a property interest. *Fuentes*, 407 U.S. at 81-82.

This Court has granted certiorari in cases similar to this because of the importance of the constitutional question, where the state court avoided the question by holding that the petitioner should have pursued its constitutional claims by way of mandamus. This Court explained:

> We are unable to reconcile the procedural holding of the Alabama Supreme Court in the

present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment.

National Ass'n for Advancement of Colored People v. Ala. ex rel. Patterson, 357 U.S. 449, 456 (1958) (holding that the Court had jurisdiction over the federal claims because the nonfederal ground relied on by the state court was without any fair or substantial support). In the present case, similarly, the procedural holdings of the Illinois Appellate Court cannot be reconciled with unambiguous past holdings by the state's courts concerning court review of constitutional questions.

Accordingly, this Court clearly has jurisdiction over Sadler's constitutional claims because the nonfederal grounds relied on by the Illinois Appellate Court is without any fair or substantial support, and it is urged that the Court grant certiorari because of the importance of making sure that state courts do not ignore the supremacy of the federal Constitution. It is further urged that the petition be granted because of the importance of protecting the property and due process rights of utility customers who are in the role of David against Goliath—except without the sling or the stone.

Monica Sadler took it upon herself to protect the financial interests of thousands of water consumers when nobody else would. Acting pro se, she sought to intervene and bring to the attention of the Illinois Commerce Commission the fact that the pending rate increase for water availability customers was precluded by the terms of contracts between the developer and the owners. The Commission allowed her to intervene, but made a mockery of that intervention by denying her the opportunity to introduce the contracts that constituted her entire rationale for intervening. The Commission did not require Aqua Illinois to live up to its statutory duty to produce the contracts. Instead, it awarded

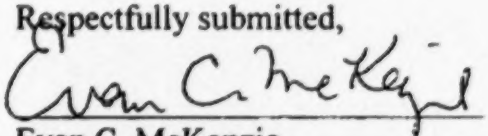
the utility the multi-million dollar rate increase it sought, even after having been advised of the manifest injustice it was perpetrating.

Sadler then turned to the Illinois courts, but found yet again that the door was closed to a full and fair consideration of her constitutional claims. Incredibly, the Illinois courts took the position that she had not actually raised the claims at all. Sadler is now in the remarkable position of petitioning this Court for an opportunity to have her constitutional claims, and by extension those of thousands of other consumers, considered on their merits for the first time in this entire proceeding.

Granting this petition would reaffirm the importance of the United States Constitution as a shield for utility consumers in the State of Illinois and across the nation. It would demonstrate that this Court recognizes the importance of due process of law in the setting of utility rates, and of the sanctity of private contracts. It would send a clear statement that the rights of the individual under the United States Constitution take precedence over the cozy relationship between a powerful private utility and state regulators.

For all the foregoing reasons, Monica Sadler respectfully asks this Court to grant her petition for a writ of certiorari.

Respectfully submitted,



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BEST AVAILABLE COPY

No. _____

In The
Supreme Court of the United State

MONICA J. SADLER

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, Second District

---

APPENDIX

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FILED
MAR 02 2007
ROBERT J. MANGAN, CLERK
APPELLATE COURT 2nd DISTRICT

Nos. 2--06--0050 & 2--06--0065 cons.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE WOODHAVEN ASSOCIATION, Petitioner-Appellant, v. ILLINOIS COMMERCE COMMISSION and AQUA ILLINOIS, INC., Respondents-Appellees.	) Petition for review) of order of Illinois) Commerce Commission.))) ICC No. 05--0071)))))
MONICA J. SADLER, Petitioner-Appellant, v. ILLINOIS COMMERCE COMMISSION and AQUA ILLINOIS, INC., Respondents-Appellees.	) Petition for review of) order of Illinois) Commerce Commission.)) ICC No. 05--0072)))))

RULE 23 ORDER

In these consolidated cases, petitioners, Woodhaven Association (Association) (case No. 2-- 06--0050) and Monica

J. Sadler (Sadler) (case No. 2--06--0065) appeal the order of respondent Illinois Commerce Commission (Commission) granting in part respondent Aqua Illinois, Inc.'s (Aqua's) requests for rate increases for the provision of sewer and water services to the Woodhaven Lakes Community and for the provision of water services to the Oak Run development. Petitioners challenge the rate increases authorized by the Commission on the grounds that they are not supported by the evidence taken during the hearings. Additionally, the Association specifically objects to the change in the methodology of allocating Aqua's management expenses and setting sewer rates. Sadler also contends that the administrative law judge abused his discretion by refusing to reopen the record to allow Sadler to present evidence even though she was allowed to intervene. We affirm.

We first present an overview of the facts in common in these consolidated cases. Further factual detail will be presented as necessary in our analysis of the issues on appeal.

In December 2004, Aqua filed tariff sheets with the Commission, seeking rate increases for its Woodhaven sewer and water divisions, and its Oak Run water division. The Commission entered several suspension orders, ultimately suspending the revised tariff sheets and the effect of the rate increases proposed by Aqua until November 2005. Additionally, the Commission consolidated the proceedings on Woodhaven and Oak Run.

Aqua's Woodhaven division exclusively provides water and sewer service to the Woodhaven Lakes Community (Woodhaven Lakes), a private, gated community in Lee County. Woodhaven Lakes consists of 6,152 individually-owned recreational campsites, 38 commercial lots, and seven residential lots. The Association is a not-for-profit corporation that was established in 1971 and is comprised of the property owners in Woodhaven Lakes. All

members of the Association are property owners. Covenants of ownership restrict the usage of the campsites to recreational use only and limit overnight stays to less than 184 a year.

About three-quarters of the Woodhaven owners spend less than 30 nights per year on the property, while over 90% of the owners spend less than 60 nights a year. Water service is available to all campsites and lots; sewer service is available to about 5,400 campsites and the 38 commercial lots. The campsites are not metered; instead, all are charged a flat rate for water and sewer, regardless of use. Where both water and sewer service are provided to the same campsite, it is combined with the water bill. Aqua represents that this is done as a convenience for the customer; Aqua maintains that the Woodhaven water, and sewer divisions are separate operating entities. All residential and commercial customers are metered. Woodhaven Lakes has about 61 permanent residents.

Aqua's Oak Run division exclusively provides water service to the Oak Run development. Oak Run is residential and recreational community consisting of 2,600 single-family residential lots in eight subdivisions. Each of the eight subdivisions operates under its own declaration of restrictive covenants. The Oak Run Property Owners Association (ORPOA) is a not-for-profit corporation whose members own property in the Oak Run development. ORPOA administers the whole of the Oak Run development and each subdivision's declaration of restrictive covenants. ORPOA's corporate purpose is to maintain and preserve the property for the benefit of its members. A member must own a lot in order to use the lake and related amenities in the Oak Run development. About 80% of the lots in the Oak Run development are undeveloped. Aqua considers the owners of the undeveloped lots to be "availability" customers because water service is available to the owner whenever the owner wants to use the service. About half of the approximately 20%

of the lots that have been developed are used as a second home or weekend retreat home. The Oak Run development has 14 commercial customers; all of the commercial customers are metered. None of the declarations of restrictive covenants as amended were submitted into evidence.

Since 1990, Sadler has owned at least one lot in one of the Oak Run subdivisions. Currently, Sadler owns one lot individually and two other lots as co-owner with her mother and her husband, respectively. Additionally, Sadler owned another lot from 1990 to 1997.

Aqua proposed a rate increase for its Woodhaven sewer division totaling $459,314, or about 61% greater than the then-current rate. For the Woodhaven water division, Aqua proposed a rate increase totaling $500,284, or about 63% greater than the then-current rate. For the Oak Run water division, Aqua proposed a rate increase totaling $213,209, or about 65% greater than the then-current rate. Aqua justified its proposed increases on the grounds that its return on common equity had fallen considerably under the then-current rates. For Aqua's Woodhaven sewer division, the return on common equity had fallen to -0.24%, for Aqua's Woodhaven water division, it had fallen to 6.95%, and for Aqua's Oak Run water division, it had fallen to -2.76%.

In addition to higher rates, Aqua proposed a change in methodology to calculate management fees and other common costs. Under the then-current rate structure, management fees and common costs were calculated on a rate base (the percentage of investor-owned physical plant used to deliver services to a particular division). Aqua proposed to use a customer-count method to calculate the management fees and common costs (the percentage of customers versus the entire customer base used to allocate the fees and costs).

During the course of the proceedings, three parties intervened: respondents Association and Sadler, along with ORPOA.[1] Late in July 2005, hearings were held before the Commission. The parties, ORPOA, and Commission staff testified about various aspects of Aqua's rate proposals. At the conclusion of the hearings, the Commission determined that the then-current rates for Aqua's Woodhaven water division, Aqua's Woodhaven sewer division, and Aqua's Oak Run water division were insufficient to generate the operating income needed to permit Aqua to earn a fair and reasonable return on its investment. The Commission therefore canceled the rates. The Commission also determined that Aqua's proposed rates did not reflect the Commission's determinations at the end of the hearing and so it canceled the proposed rates as well. Instead, the Commission ordered that Aqua's Woodhaven water division should be authorized to place into effect tariff sheets designed to produce annual base rate revenues of $1,164,169, an increase of about $430,500, or nearly 54%, over the previous rate. The Commission also ordered that Aqua's Woodhaven sewer division should be authorized to place into effect tariff sheets designed to produce annual base rate revenues of $1,048,545, an increase of about $344,500, or nearly 46% over the previous rate. Last, the Commission ordered that Aqua's Oak Run water division should be authorized to place into effect tariff sheets designed to produce annual base rate revenues of about $489,900, an increase of $165,600, or about 50% over the previous rate. Additionally, the Commission accepted Aqua's change in methodology in the calculation of management fees and common costs, over the objections of the Association and against the recommendation of Commission staff Respondents timely appeal. We address each appeal in turn.

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[1]ORPOA is not a party to these appeals.

On appeal, the Association raises two issues. First, the Association contends that the Commission's order regarding the calculation of management fees and common costs was not supported by the evidence in the record, was arbitrary, does not benefit the customer-members of the Association, and was unjustified by the Commission. The Association also contends that the Commission erred in retaining Aqua's methodology in setting sewer rates for commercial customers where the Association, Aqua, and the Commission staff had agreed upon a flat fee. Before addressing these issues, we first consider our standard of review.

The Commission's decision is reviewed in accord with the Public Utilities Act (220 ILCS 5/1-101 *et seq.* (West 2004)). The factual findings and conclusions of the Commission are considered to be *prima facie* true; the Commission's order is considered to be *prima facie* reasonable. 220 ILCS 5/10-201(d) (West 2004). The appellant bears the burden of proof as to all issues it raises on appeal of the Commission's order. 220 ILCS 5/10-201(d) (West 2004). Review of the Commission's order is closely circumscribed; the questions that may be considered are: whether the Commission acted within its authority, whether it made findings in support of its decisions, whether the factual findings and decision are substantially supported by the evidence, and whether a party's constitutional rights have been infringed by the decision. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 55 Ill. 2d 461, 469 (1973).

The Commission's findings and decision are entitled to great deference from the reviewing court because of the expertise the Commission possesses in the field of public utilities. *ArcherDaniels-Midland Co. v. Illinois Commerce Comm'n*, 184 Ill. 2d 391, 397 (1998). The reviewing court is not to usurp the Commission's function by conducting an

independent investigation of the issues presented or to substitute its judgment for that of the Commission. *Illinois Bell*, 55 Ill. 2d at 469, quoting *Produce Terminal Co. v. Illinois Commerce Comm'n*, 414 Ill. 582, 589 (1953).

While the Commission's interpretation of a legal issue, such as the interpretation of a statute, is not binding on the reviewing court, the reviewing court will nevertheless defer to the Commission's interpretation in view of its experience and expertise. *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142, 152-53 (1983). This is especially true where the legal interpretation has been consistently adhered for a long period of time. *Illinois Consolidated Telephone*, 95 Ill. 2d at 153. However, the Commission's interpretation may still be given deference or persuasive weight by the reviewing court where the interpretation is novel or not a long-standing one. *Illinois Consolidated Telephone*, 95 Ill. 2d at 153-54. Moreover, the Commission's interpretation of a legal question should only be reversed if it is erroneous. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 282 Ill. App. 3d 672, 676 (1996).

The Commission's order is to be based upon "substantial evidence." This standard allows that the evidence in the record may support more than one possible finding and may even support several findings. *Central Illinois Public Service Co. v. Illinois Commerce Comm'n*, 268 Ill. App. 3d 471, 479 (1994). "The evidence need only be such that a reasoning mind would accept the evidence as sufficient to support a particular conclusion." *Central Illinois Public Service*, 268 Ill. App. 3d at 479. Demonstrating the lack of substantial evidence to support a finding is not met only by showing that the evidence may support a different conclusion; it must be shown that the opposite conclusion is clearly evident. *Continental Mobile Telephone Co., Inc. v. Illinois Commerce Comm'n*, 269 Ill. App. 3d 161, 171 (1994).

The Commission only need provide sufficiently specific findings to allow informed and intelligent review of its order. *Lakehead Pipeline Co. v. Illinois Commerce Comm'n*, 296 Ill. App. 3d 942, 957 (1998). The Commission is not required to make particular findings for each evidentiary fact or claim; rather, the Commission need only make findings on the facts essential to its determination. *Citizens Utilities Co. of Illinois v. Illinois Commerce Comm'n*, 49 Ill. 2d 458, 463 (1971).

The Association first contends that the Commission erred by allowing Aqua to change its method by which Aqua allocated management fees and common costs from a rate-based percentage to a customer count. Under the previous method, the rate base for each division was compared with Aqua' state-wide rate base and the common costs and management fees were apportioned according to the resulting percentage. In this case, Aqua proposed to change to a customer count method where the number of water customers and number of sewer customers were counted separately and compared to the total of all of Aqua's customers throughout the state. The management fees and common costs would then be apportioned according to the resulting percentage. The Association notes that this results in a 300% rate increase to customers in Aqua's. Woodhaven division. The Association challenges the Commission's decision as being unsupported by sufficient evidence and failing to demonstrate that the customers were benefitted by Aqua's services. Central to its challenge, the Association emphasizes that Aqua did not present any studies or analyses to support its proposal to move to a customer-count basis of allocating management fees and common costs. The Association concludes that, for those reasons, the Commission's decision on this issue was in error. We disagree.

The Commission's decision to endorse the allocation of management fees and common costs on the basis of customer counts is supported by substantial evidence. The record shows

that all of the other Aqua divisions in Illinois use the customer-count method to allocate management fees and common costs incurred by all customers. Further, the record demonstrates that a specific division of Aqua does not incur these costs (e.g., the salaries of Aqua's president and chief financial officer, or the cost to prepare the overall state budget); rather, the costs are incurred at the Illinois corporate level. On the other hand, where a specific division incurs expenses, they are allocated to that division. Aqua also justified the methodology by noting that, for management fees and common costs, each customer pays the same amount. Under the rate-based methodology, by contrast, a customer in one division will pay a different amount for management fees and common costs than a customer in another division. Additionally, Aqua noted that, because a uniform methodology was not adopted throughout its divisions in the state, Aqua was not able to recover 100% of its legitimately incurred management fees and common costs. However, under the customer count methodology, the per customer-cost of the allocated common costs would be the same regardless of the division in which the customer resided.

The Commission accepted Aqua's evidence and argument. The Commission held:

> "Both the customer count and rate base allocation methodologies have been used by the Commission in the past. The decision to be made here is which methodology is more appropriate under the circumstances. The starting point for such a determination is what are the costs to be allocated. As previously noted Accounts 634 and 734 [the ledger accounts where management expenses and common costs are booked] contain contractual costs paid for the performance of management functions. Aqua asserts that the cost to prepare an overall state budget and the salaries and wages of Aqua's President and Chief

Financial Officer are among the costs included in these accounts. No one disputes this assertion. Such costs are typically considered common costs and as such are not allocated to specific divisions.

Allocating such common costs on a customer count basis is not inherently wrong. Moreover, the Commission can discern no reason why these particular types of costs should not be allocated using a customer count methodology in light of the arguments of record. Although Aqua's [management fees and, common costs] in current rates for Woodhaven Water and Sewer are allocated using a rate base methodology, this does not prohibit Aqua from ever using a different allocation methodology. Nor does the fact that Woodhaven Water and Sewer customers do not take service all year require a finding in [the Association's] favor. Aqua must still maintain the water and sewer system all year and be ready to provide service. The common costs in question would not, from the record, appear to diminish any in light of the customer usage. Furthermore, [the Association] must realize as well that Aqua is operating both a water and sewer system, which at the corporate level are separate entities despite appearances to the customer. This is not to say that certain savings would never be realized at the corporate level, but this record does not reflect any such diminished costs. Therefore, counting each water customer and sewer customer, even if they are in fact the same person, is not inappropriate. *** Aqua's proposal *** to allocate [management fees and common costs] using a customer count methodology is reasonable and adopted."

Based on our review of the record and the Commission's determination on this issue, we conclude that there was substantial evidence in the record to support the

Commission's decision on the allocation of management fees and common costs. The Commission reviewed the evidence of record and explained its rationale sufficiently to allow this court to conduct an informed and intelligent review. The Association's contention that the Commission's decision was not supported by substantial evidence is without merit.

The Association also contends that the Commission's decision on the allocation of common costs issue was arbitrary and capricious due to the lack of evidentiary support. In support of this contention, the Association cites to *United Cities Gas Co. v. Illinois Commerce Comm'n*, 225 Ill. App. 3d 771, 782 (1992), for the proposition that the Commission cannot change its policies regarding substantive issues in an arbitrary and capricious manner and without evidentiary support. We note first that *United Cities* is inapposite. There, the Commission changed its policy regarding rate-making with no explanation and no findings. *United Cities*, 225 Ill. App. 3d at 782. Here, by contrast, the record shows that Aqua has implemented the customer-count allocation method in all of its other Illinois divisions and that the Commission has endorsed this methodology in other instances. Further, the Commission explained its rationale and the record supports the idea that the implementation of the customer count methodology will mean that every Aqua customer throughout the state will bear the same per-customer charge for management fees and common expenses. The Commission determined that this was a fair and reasonable result and nothing in the record or in the Association's arguments serves to dispute the Commission's conclusion. Additionally, we note that, unlike United Cities, here, there is sufficient, evidence in the record to support the Commission's decision on Aqua's proposed change in methodology. For these reasons, the Associations argument that the Commission's decision was arbitrary and capricious is without merit.

The Association also appears to criticize the Commission's decision on the basis that it contained inadequate findings. The Association asserts that the Commission found only that "using 'a customer count basis is not inherently wrong'." We disagree. The Commission's order set forth the positions of the parties at length. As quoted above (*supra* at 9-10), the Commission then carefully explained its reasoning and its conclusions. The face of the Commission's order belies the Association's contention.

The Association attaches paramount importance to the fact that "Aqua presented no study or analysis on why the current rate-based methodology was inappropriate." The Association argues that the Commission unthinkingly accepted Aqua's methodology by finding that "a customer count basis is not inherently wrong." We disagree. First, there is no requirement that a utility must conduct any particular type of analysis or study to support its proposal. *Illinois Power Co. v. Illinois Commerce Comm'n*, 339 Ill. App. 3d 425, 439 (2003). Second, we note that the Association offers no authority in support of its inferred position regarding the necessity of a "study or analysis." Moreover, the Commission's decision, quoted in part above, addressed the concerns of both the Association and the Commission's staff in reaching its final decision. Further, in determining that the customer count methodology was most appropriate under the circumstances of this case, the Commission relied on Aqua's arguments that the customer count methodology apportioned the management fees and common costs equally among all of Aqua's customer, and that Aqua would be able to recoup 100% of its common costs. Additionally, the Commission had accepted the customer count allocation in Aqua's most recent rate cases for its Kankakee and Vermilion divisions. As noted above, the Commission is free to choose among alternatives and the evidence need only support the Commission's choice; it need not exclude other, reasonable alternatives as well. *Central Illinois Public Service*, 268 Ill. App. 3d at 479. Aqua's failure to provide a study or

analysis is not fatal to its position before the Commission or the Commission's decision on this issue.

The Association appears to contend that the change in methodology results in an unduly large and unfair increase in the allocation of management fees and common costs to its members. The Association notes that, under the new method, the Woodhaven water division receives a 305% increase in management fees and common costs and the Woodhaven sewer division receives a 249% increase. Again, we find no merit in this contention. The evidence of record supports the conclusion that, under the previous methodology, the Woodhaven division and the Association members were allocated too little of the management fees and common costs. Further, the Woodhaven division is among the smaller divisions comprising Aqua. The dollar amounts involved are relatively small. When an increase occurs, the percentage of the increase may appear disproportionately large even while the absolute amount remains reasonable. Further, management fees and common costs are one component of a customer's water and sewer rates among many. While we recognize that the Association's argument that its members will see such a large-seeming percentage increase in management fees and common costs component of their water and sewer bills is proper for the Commission to consider, nevertheless there is sufficient evidence in the record to support the Commission's decision to allow it to occur.

The Association also contends that the Commission cannot find that a rate is reasonable without evidence, citing to *Central Illinois Public Service Co. v. Illinois Commerce Comm'n*, 5 Ill. 2d 195 (1955). We find the case to be inapposite, however, as it involved the utility's attempt to set rates based on two contracts it had negotiated with other entities and without providing any cost support for the Commission to evaluate. *Central Illinois Public Service*, 5 Ill.

2d at 204. Further, as we have already noted, there is sufficient evidence in the record to support the Commission's decision.

The Association also cites to *Illinois Bell*, 55 Ill. 2d 461, for the proposition that expenses to be recouped in the utility's rates must directly benefit the customers through the services provided. Aqua properly notes that an argument not advanced before the Commission may not be raised on appeal. 220 ILCS 5/10-113(a) (West 2004). The Association did not raise this contention before the Commission and has therefore forfeited consideration of it on appeal. In any event, *Illinois Bell* is inapposite as it involves costs that were not directly related to the provision of services to the customers. *Illinois Bell*, 55 Ill. 2d at 481-82. Here, by contrast, the management fees and common costs involved the management, operation, and accounting functions of Aqua, along with the assembly of financial records and billing activities performed by Aqua on behalf of its various divisions throughout the state. These costs would have been recoverable if they were independently incurred by the Woodhaven water and sewer divisions and, therefore, they are appropriately considered to benefit all the customers, including those in the Woodhaven divisions.

To sum up, the Association attacks the evidentiary basis for the Commission's order regarding the narrow issue of the allocation of management expenses and common costs. Our review of the record demonstrates that the Commission's order was supported by substantial evidence, contained sufficient factual findings and reasoning to support its decision, and was not otherwise arbitrary or capricious. We therefore affirm the Commission's order on the issue of the allocation of management fees and common costs.

Next, the Association contends that the Commission erred by allowing commercial sewer rates to remain unchanged where the parties and Commission staff had agreed to impose a flat fee that was the same for all customers, regardless of

whether they were campsites or commercial customers. The Association argues that, because there was an agreement between the parties and the Commission staff, no one bothered even to brief the issue. Under the previous rate structure, commercial sewer customers would be charged 130% of their water bill for sewer service. Once again, the Association argues that there is no evidence in the record to support the Commission's decision to retain the rate structure.

Contrary to the Association's argument, we find that there is no evidence in the record to support a change from the previous rate structure. Instead, the record showed that, if the flat rate were adopted, residential customers would be required to make up a $15,000 revenue shortfall caused by the flat commercial rate. In the absence of evidence, the Commission decided it was improper to impose that additional burden on residential customers. Further, Aqua noted that commercial customers were not responsible for the high level of uncollectible bills and to increase the responsibility of the residential customers would only exacerbate the problem of uncollectible bills. As noted above, a rate change must be supported by substantial evidence. See *Central Illinois Public Service*, 268 Ill. App. 3d at 479. Had the Commission accepted the agreement as to rate in the absence of evidence or argument, as well as in the presence of the contrary factors identified above, then its decision would have been rightfully subject to a challenge that it had acted arbitrarily and capriciously. Accordingly, we affirm the Commission's decision on this issue.

In summary, then, we find no error in the Commission's decision regarding the allocation of management fees and common costs. Likewise, we find no error in the Commission's decision regarding the commercial sewer rate in Aqua's Woodhaven sewer division. For the foregoing reasons, therefore, we affirm the Commission's decision in appeal No. 2--06--0050.

On appeal, Sadler contends that the Commission's decision regarding the water availability charges as well as the rate increase granted by the Commission were not supported by substantial evidence. Sadler argues that this was because the Commission refused to allow her to present evidence resulting in an incomplete and misleading record on which the Commission based its decision. The Commission responds that, as an intervenor, Sadler was required to take the record in the state in which she found it when she intervened. As the record was marked "heard and taken" at the time Sadler intervened, the Commission contends that it was under no obligation to reopen the proofs to allow Sadler to present any new, substantive evidence. Sadler replies that the Commission's refusal to reopen the record constituted an abuse of discretion, noting that the Commission reopened the proofs to allow Aqua to submit proof that it complied with the notice provisions of the Public Utilities Act. The Commission disputes the factual basis and presumptions of Sadler's argument on this point. As we will explain below, we agree with the Commission's positions.

The threshold issue we must consider first is whether the Commission erred by refusing to reopen the proofs to allow Sadler to present new, substantive evidence. If we find error on this issue, then we may proceed to consider its effect on the Commission's decision regarding the rates charged to Aqua's Oak Run division customers and the propriety of the water availability charge. Again, as noted above, we include any facts necessary to our analysis that have not been previously discussed.

As an initial matter, we recall the applicable standard of review. We review the Commission's decision to make sure that it is supported by substantial evidence of record, that it did not act outside the scope of its authority, that its findings did

not violate the state or federal constitution or law, that its factual findings were not against the manifest weight of the evidence, and that the proceedings in which the Commission reached its decision did not violate the state or federal constitution or laws to the prejudice of the party appealing the Commission's decision. *Citizens Utilities Co. v. Illinois Commerce Comm'n*, 124 Ill. 2d 195, 206 (1988); *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 279 Ill. App. 3d 824, 829 (1996). We also note that the Commission's factual findings are considered to be prima facie true, its orders are considered to be *prima facie* reasonable, and the burden of proof on all issues raised on appeal is on the party appealing the Commission's decision. *Business & Professional People*, 279 IL App. 3d at 829.

Sadler argues that her rights were infringed by the Commission's refusal to allow her to present evidence by not reopening the proofs when she intervened. It is well established, however, that an intervenor must take the record as it exists at the time of intervention and that the intervenor does not have the right to change the issues or raise new issues between the parties, or to delay the proceedings. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Harris Trust & Savings Bank*, 63 Ill. App. 3d 1012, 1022 (1978). Here, the record belies Sadler's contentions.

The Commission proceedings began when Aqua filed its tariff sheets in December 2004. Written testimony was submitted to the Commission and, in July 2005, live testimony was taken. Immediately thereafter, the record was marked "heard and taken" and the administrative law judge in charge of the proceedings established the procedure and timeline for the parties to brief the issues. This included time for the parties to submit briefs on the contested issues and responses to the briefs. Then the administrative law judge would issue a proposed order. Thereafter the parties would have time to submit exceptions to the proposed order and replies. The

administrative law judge would then prepare the final, post-exception order and submit it, along with the entire record to the Commission for its deliberation and decision.

On September 23, 2005, when Sadler moved to intervene, the parties and the Commission staffhad already filed their initial and response briefs. Further, according to the schedule, on October 5, 2005 (12 days after Sadler moved to intervene), the administrative law judge would issue his proposed order for the parties to file exceptions upon. Thus, Sadler's motion to intervene in the proceedings was raised after the evidence had been taken and the parties had submitted briefing on the contested issues, and just before the initial proposed order was to be issued.

Further, Sadler wished to introduce evidence of the declarations of restrictive covenants of the various Oak Run subdivisions and to raise arguments that they represented a contractual bar to the rate increase in the water charges proposed by Aqua, as well as challenging the basis of the water availability charge itself The introductir of such issues possibly would have required the presentation of evidence by Sadler, as well as necessarily requiring the opportunity for Aqua and the Commission staff to present evidence on the issue. Then the parties along with Sadler would have also required the opportunity to brief the issues she raised. Sadler does not acknowledge these requirements, let alone suggest how they could have been accomplished in a timely manner, given the November deadline for the Commission's final decision. See 220 ILCS 5/9--201(a),(b) (West 2004) (limiting Commission's power to suspend newly-proposed rates to an 11-month period; here Aqua was utilizing a 2005 test year and Commission action was required by November 2005).

We also note, and Sadler concedes, that she possessed the alternate avenue of relief of raising the issue via the Commission's formal complaint procedures. Sadler complains

that making a complaint places the burden upon her as the complainant, instead of on Aqua in its rate case. Sadler seems to suggest that this constitutes undue prejudice accruing from the Commission's initial abuse of discretion in refusing to reopen the record. Nothing in the record or Sadler's arguments, however, show why she was unable to convey her concerns to ORPOA and to make sure that ORPOA raised them before the Commission. Even if Sadler's differences with ORPOA were raised as good cause to reopened the record by Sadler, the Commission's rejection ofthose differences as constituting good caus was not an abuse of discretion because if ORPOA, the representative of all the Oak Run residents, rejected Sadler's proprietary issues, then it was incumbent upon Sadler to timely act so as to place her concerns before the Commission. As a result of this failure, Sadler became involved in the proceedings in the final stages, after evidence and arguments had been finalized. Based on the record before us, then, we hold that the Commission did not abuse its discretion in refusing to reopen the record.

Sadler contends that the Commission's order granting her leave to intervene was effectively illusory because she was not allowed to present evidence in support of the issues she sought to raise by intervening. In support, Sadler cites to *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 226-27 (1989), and *People of Cook County ex rel. O'Malley v. Illinois Commerce Comm'n*, 237 Ill. App. 3d 1022, 1029 (1992), for the proposition that an intervenor in a case before the Commission has the right to present evidence. We agree with Sadler's proposition, but find the cases to be distinguishable. Neither case cited by Sadler concerns an intervenor attempting to present evidence after the evidentiary portion of the process before the Commission is closed. Thus, the cases stand for little more than the truism that a party may present evidence in support of its position, if some other exception to the rule does not apply. Here, however, the exception to the proposition

Sadler advances is that she attempted to intervene after the evidence had been closed. At such a point-in the proceedings, the Commission is not obligated to reopen the evidence, because the late intervenor must accept the record as it exists at the time of intervention. *Chicago, Milwaukee, St. Paul & Pacific*, 63 Ill. App. 3d at 1022.

Sadler argues that it was fundamentally unfair for the administrative law judge to close the record while her motion for leave to intervene was pending. Sadler's argument is misleading. The administrative law judge closed the record in July 2005, well before Sadler filed her motion. Thus, the administrative law judge had no inkling that Sadler would seek to intervene when the record was initially closed. Later, the record was reopened for the limited purpose of allowing Aqua to submit procedural documentation that raised nothing new substantively—evidence that Aqua had complied with public notice requirements. This occurred while briefing had been completed and the administrative law judge was preparing theinitial proposed order. During the time the record had been reopened for the limited supplementation by Aqua, Sadler filed her motion for leave to intervene. Thus, while it is technically correct, Sadler's argument is misleading because, truly, the record had been closed nearly two months before Sadler sought leave to intervene. Therefore, Sadler's argument is without merit.

Sadler notes, and the Commission concedes, that the proofs may be reopened on good cause shown. Sadler contends that she made that showing. We disagree. Sadler proposed to adduce portions of the restrictive covenants and later amendments, not the entire document. Sadler argues that such a small amount of evidence would not have been a burden. This overlooks, however, the other parties' rights to submit evidence to oppose or complete Sadler's, as well as the fact that the parties would have been required to brief the issue or issues Sadler sought to raise. Sadler also contends that ORPOA did

not represent her interests and that she did not make this determination at any time before she filed her motion for leave to intervene. Sadler offers this as additional good cause to allow the reopening of the record. Again, we find nothing in the record or her arguments that suggest why she could not have made her concerns known to ORPOA, the body charged with representing the interests of the Oak Run property owners. Sadler does not go so far as to claim that ORPOA affirmatively misled her regarding whether it would introduce the restrictive covenants and raise her concerns. Rather, Sadler seems to indicate that ORPOA put her off. Such conduct by ORPOA should have reasonably alerted her that she would need to intervene in order to present the issues that were of concern to her because ORPOA was reluctant to. We do not consider this to be good cause shown to reopen the record and, accordingly, we do not find the administrative law judge's determination on this issue to have been an abuse of discretion.

Last, Sadler argues that the Commission's decision violates the Commerce Clause of the United States and the Illinois Constitutions. The Commission contends that these arguments were not raised before the Commission at any time and are raised for the first time on appeal. The Public Utilities Act "expressly limits the scope of a party's appeal to the reviewing court to those issues raised in the petition for rehearing before the Commission." *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 134 (1995), citing 220 ILCS 5/10--113 (West 1992) (now codified at 220 ILCS 5/10-113 (West 2004)). The Commission urges that we find Sadler to have forfeited this contention. Sadler strenuously contends that she raised the gist of this argument in her application for rehearing. We have carefully reviewed Sadler's application for rehearing as well as her other post-order motions and agree with the Commission that this issue was not adequately raised. In her reply brief, Sadler argues that she exhaustively set forth the reasons she believes the Commission to have erred. Even accepting this argument wholly, we cannot

discern the argument that the Commission's action violated the state or federal constitutions or, specifically, the Commerce Clause of the United States or Illinois Constitutions in Sadler's postjudgment motions and application for rehearing. Thus, while, as Sadler argues in her reply brief, her application for rehearing complies with the statutory requirements by setting forth the reasons she believes the Commission erred, it does not contain the constitutional argument she now wishes to raise. Moreover, and tellingly, Sadler herself does not specifically indicate in her reply brief where in the record she believes she raised this issue before the Commission. Accordingly, we find the our consideration of this argument to have been forfeited.

As we have found no error in the Commission's determination regarding the closing of the record, we need not address Sadler's issues on appeal further. In summary, then, for appeal No. 2--06--0065, for the above-stated reasons, we affirm the Commission's decision.

For the foregoing reasons, the order of the Commission is affirmed.

Order affirmed.

O'MALLEY, J., with BOWMAN and KAPALA, JJ., concurring.

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the fourteenth day of May, 2007.

Present: Robert R. Justice Charles E. Freeman

Justice Charles E. Freeman	Justice Thomas R. Fitzgerald
Justice Thomas L. Kilbride	Justice Rita. B. Garman
Justice Lloyd A. Karmeier	Justice Anne M. Burke

On the thirty-first day of May, 2007, the Supreme Court entered the following judgment:

No. 104429

The Woodhaven Association, Respondent	Petition for Leave to Appeal from Appellate Court Second District
v.	2-06-0050 2-06-0065
Illinois Commerce Commission and Aqua Illinois, Inc., Respondents	050071 050072
Monica J. Sadler, Petitioner	
v.	
Illinois Commerce Commission and Aqua Illinois, Inc.,	

Respondents

The Court having considered the Petition for leave to appeal and being fully advised of the premises, the Petition for leave to appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

[SEAL]

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this sixth day of July, 2007.

s/Juliann Hornyak, Clerk
Supreme Court of the State of Illinois